

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

A GOVERNMENT INQUIRY INTO
OPERATION BURNHAM AND
RELATED MATTERS

Date of Minute: 18 July 2019

MINUTE No 19 OF INQUIRY

Introduction

[1] Clause 6.2 of the Inquiry’s Terms of Reference requires the Inquiry to “[e]xamine the treatment by NZDF of reports of civilian casualties following Operation Burnham”. Under the heading “Scope of Inquiry”, the Terms of Reference go on to say:

7. Having regard to its purpose, the Inquiry will inquire into and report on the following:

...

7.5 The extent of NZDF’s knowledge of civilian casualties during and after Operation Burnham, and the content of written NZDF briefings to Ministers on this topic;

7.6 Public statements prepared and/or made by NZDF in relation to civilian casualties in connection with Operation Burnham;

7.7 Steps taken by NZDF after Operation Burnham to review the conduct of the Operation;

...

[2] These aspects of the Terms of Reference reflect the fact that *Hit & Run* alleges that there was a “cover up” on the part of NZDF,¹ an allegation repeated

¹ Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017), esp at chs 6 and 7.

forcefully by Mr Hager in his presentation to the Inquiry on the first day of Module 2.²

[3] The extracts from the Terms of Reference raise four issues for the Inquiry's examination:

- (a) What was NZDF's knowledge of civilian casualties during and after Operation Burnham?
- (b) What written briefings did NZDF give Ministers about civilian casualties after Operation Burnham?
- (c) What public statements did NZDF prepare and/or make in relation to civilian casualties during Operation Burnham?
- (d) What steps did NZDF take to review the conduct of Operation Burnham?

For present purposes, the Inquiry will limit the question in (d) above to reviewing the conduct of Operation Burnham in relation to casualties caused.

Apparent inconsistencies?

[4] The Inquiry can address some aspects of these issues relatively easily. For example, NZDF should have provided the Inquiry with all written briefings provided to ministers about civilian casualties on Operation Burnham. These can be collated and assessed. Equally, NZDF should have provided the Inquiry with copies of all public statements which it prepared or made about casualties, civilian or insurgent, on Operation Burnham. In addition, the Inquiry has conducted extensive research of open source material, which has produced relevant material. Again, this material can be collated and assessed. As well, the Inquiry has contemporaneous documentation that is relevant to NZDF's state of knowledge in

² Nicky Hager "Military and political context" (presentation at Public Hearing Module 2, 22 May 2019) Inquiry into Operation Burnham "Public Hearing Module 2" <operationburnham.inquiry.govt.nz>.

the immediate aftermath of Operation Burnham. This material also can be collated and assessed. All this work is well in hand.

[5] However, analysis of this documentary material raises a number of questions. We will illustrate by reference to certain events in 2010.

[6] A media release issued by the International Security Assistance Force (ISAF) on 29 August 2010 (after the ISAF Incident Assessment Team (IAT) had finished its initial assessment) noted the possibility of civilian casualties caused by errant rounds from a helicopter. The statement contained what was in effect an apology by the United States officer who had headed the IAT investigation, Brigadier General Zadalis, for any civilian casualties that may have occurred. That was followed by a further ISAF media release on 30 August 2010, in which the Commander of the ISAF Joint Command, Lieutenant General David M Rodriguez, said that he had ordered an investigation into the allegations of civilian casualties on Operation Burnham. The release said that the results of the investigation would be provided on completion. The report of the AR15-6 investigation, a redacted version of which was recently cleared for public release by the United States, seems to be the relevant report as it is addressed to “Commander, United States Forces-Afghanistan (USFOR-A) and International Security Assistance Force (ISAF)”,³ suggesting that the report served a dual purpose.

[7] NZDF’s internal documentation in the period immediately following Operation Burnham shows that some NZDF personnel noted the possibility of civilian casualties while others rejected it:

- (a) Two emails in the tranche of documents disclosed by the Inquiry prior to Module 2 are examples of the former. An email dated 25 August 2010 noted that NZDF personnel were involved in a process which was attempting to establish whether there were civilian casualties on Operation Burnham and said that, at that

³ Memorandum for Commander, United States Forces-Afghanistan (USFOR-A) and International Security Assistance Force (ISAF) *Findings and Recommendations, AR 15-6 Investigation - Tirgiran Village* (30 September 2010) Inquiry into Operation Burnham “Disclosure of documents: United States Government material” <operationburnham.inquiry.govt.nz>.

stage, there may or may not have been such casualties.⁴ An email of 27 August 2010 recorded that at that point, there was no concern about the actions of the ground forces but that civilian casualties might have resulted from the accidental impact of rounds from the air assets on a particular house.⁵

- (b) By contrast, a memorandum dated 10 December 2010 from the Chief of Defence Force to the Minister of Defence referred to the ISAF IAT's investigation and said:⁶

As a result of their investigation, the joint assessment team concluded that the allegations were baseless and categorically cleared the actions of the [NZSAS response task force] and coalition air of all allegations. The assessment concluded that "having reviewed the evidence there is no way that civilian casualties could have occurred". The joint assessment team's report has not been released beyond Headquarters ISAF and our knowledge of the findings [is] based on the comments provided by the NZSAS Task Force commander, who was permitted to read the report.

However, this does not appear to be consistent with what the IAT's report said, or with either of the ISAF media releases mentioned in paragraph [6] above.

- [8] Obviously, there is a question as to how the Inquiry should examine apparent discrepancies of this type.

⁴ 02/09 - External Release Update Obj Burnham Op 21 Aug 10 Update 2 (25 August 2010) Inquiry into Operation Burnham "Disclosure of documents: Documents relating to Operation Burnham" <operationburnham.inquiry.govt.nz>

⁵ 02/13 - External Release Update Obj Burnham Op 21 Aug 10 Update 4 (27 Aug 2010) Inquiry into Operation Burnham "Disclosure of documents: Documents relating to Operation Burnham" <operationburnham.inquiry.govt.nz>.

⁶ New Zealand Defence Force NZSAS Operations in Baghlan Province August and October 2010 (Briefing to Minister of Defence, 10 December 2010) at [7], in [*Operation Burnham Advice to Government \(second information pack\)*](#) "Operation Burnham" <www.nzdf.mil.nz>, p 7.

A public hearing

[9] The Inquiry signalled in Ruling No 1 that, despite its view that most of the evidence would have to be taken in private, there would be instances where witnesses would give their evidence in public and be subject to cross-examination. The Inquiry considers that the NZDF evidence on aspects of the issues identified in paragraph [2](a) – (d) should be dealt with in this way. The reason for this is that NZDF personnel have made firm statements publicly that no civilian casualties occurred during Operation Burnham and have supported ministers to make similar public statements. These actions were taken despite the repeated allegations of civilian casualties in the media and elsewhere from immediately after the Operation until the present. Given that the statements of NZDF and ministers were made publicly, the Inquiry considers that they should be explained publicly. The basic questions of what NZDF personnel knew, what they reported and what was said publicly should, in the Inquiry's view, be addressed in a public forum.

[10] The hearing will investigate the accuracy of public statements made by or on behalf of NZDF about the possibility of civilian casualties, in light of the information available to NZDF at the relevant times, and the advice given to ministers on that topic. Although some of the material relevant to these matters is currently classified, much is not, and the Inquiry anticipates more will be declassified before the hearing. Any relevant material that remains classified as at the time of the hearing can be dealt with by gisting or similar devices.

[11] Given the nature of the matters on which the Inquiry is seeking evidence, it will depart from the process it has adopted for its sensitive witness interviews and follow the traditional pattern. The Inquiry will ask NZDF to prepare briefs of evidence from the witnesses on the matters the Inquiry wishes to have addressed, which are identified below. The briefs, which are to be provided to the Inquiry and other core participants on a confidential basis five working days before the hearing, will form the basis of the witnesses' evidence. Following the reading of the brief, the witness will be cross-examined by Counsel Assisting. The Inquiry will allow time-limited supplementary cross-examination by one counsel on

behalf of all the non-Crown core participants.⁷ Counsel for the NZDF will then have an opportunity to re-examine the witness.

[12] Prior to the commencement of the evidence, NZDF may if it wishes make a brief opening submission. At the conclusion of the evidence, NZDF and other core participants may, if they wish, make closing submissions on the matters dealt with.

Matters to be covered

[13] The matters which are to be covered at the hearing are set out below. The Inquiry expects that NZDF will call those who can give direct evidence of the matters to be covered. NZDF is to provide a list of its proposed witnesses to the Inquiry by 5 pm on Friday 30 August 2019.

[14] The matters to be covered are as follows.

[15] Whether NZDF undertook its own investigation of the possibility of civilian casualties immediately following Operation Burnham. If so, what was the nature of the investigation? If not, why did NZDF not carry out its own investigation? This should include reference to:

- (a) any policy or policies that NZDF had in 2010 in relation to the investigation of allegations of civilian deaths in the course of operations in which NZDF personnel were involved;
- (b) any steps NZDF took during and/or immediately after Operation Burnham to ascertain who had been killed or injured and whether they were civilians or insurgents;

⁷ Although this hearing will be conducted along traditional lines, it remains the case that the Inquiry's process is inquisitorial. Cross-examination will be permitted only to the extent that it is of assistance to the Inquiry. Controls on cross-examination are not unusual in the context of inquiries: see, for example, The Inquiry Rules (UK) r 10 and Practice Guideline 3 (published 8 February 2018) of Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

- (c) NZDF's knowledge of, and participation (if any) in, any contemporaneous investigations carried out by other organisations.

[16] The basis for (i) any public statements made by NZDF and (ii) any advice provided to ministers, in relation to casualties (whether civilian or insurgent) resulting from Operation Burnham:

- (a) in the period immediately after Operation Burnham;
- (b) in December 2010;
- (c) in April 2011;
- (d) in 2014, after the screening of the documentary, *Collateral Damage*, on Māori TV;
- (e) in 2017, after the publication of *Hit & Run*.

[17] When describing the basis for (i) its public statements and (ii) its advice to ministers, NZDF should address:

- (a) the intelligence and other reports⁸ (external or internal) in relation to casualties available to NZDF at the relevant times;
- (b) the extent to which its public statements and advice to ministers incorporated or relied on that material;
- (c) the significance given by NZDF to the location errors in *Hit & Run* when addressing publicly the allegation that civilian casualties resulted from the Operation.

⁸ Where any relevant intelligence or other reports remain classified, their contents should be gisted.

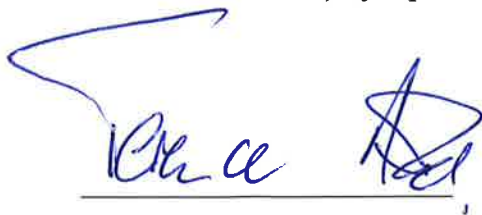
Collated material

[18] In order to assist core participants and to ensure that all relevant matters are covered, the Inquiry has prepared schedules of the following:

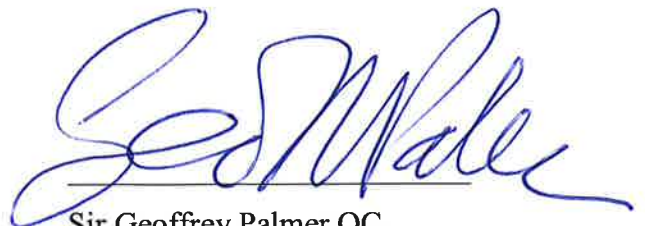
- (a) All the public statements in relation to the possibility of civilian casualties on Operation Burnham that were made first, by ministers and second, by NZDF prior to April 2018, when the Inquiry was established. The schedule, appended to this Minute, includes statements that have been made in the House of Representatives and via press releases and conferences. The Inquiry asks core participants to identify any statements that are missing from it.
- (b) All written briefings given by NZDF to ministers about civilian casualties on Operation Burnham, to the extent that they have been publicly disclosed. Schedule B contains a list of publicly disclosed documents. A further list may be published shortly following the completion of the Inquiry's process for reviewing classified material. The Inquiry asks core participants to identify any written briefings of which they are aware that are not on the lists.

Date of hearing

[19] The hearing will be held in Wellington between Monday 16 September and Friday 20 September 2019. Accordingly, the briefs of evidence of NZDF's witnesses should be provided to the Inquiry and to other core participants (on a confidential basis) by 5 pm on Friday 6 September 2019.



Sir Terence Arnold QC



Sir Geoffrey Palmer QC

Core participants:
Mr Radich QC for New Zealand Defence Force
Mr Salmon for Mr Stephenson
Mr Hager

Schedule A

Relates to	Date	Title of document
NZDF public statement	20/04/2011	<u>"NZ Defence Force Operations in Bamyan Province on 22 August 2010."</u>
NZDF public statement	30/06/2014	<u>NZDF statement to Native Affairs.</u>
NZDF public statement	21/03/2017	<u>"NZDF Response to Book."</u>
NZDF public statement	26/03/2017	<u>"NZDF Statement on Hager/Stephenson Book."</u>
NZDF public statement	27/03/2017	<u>"Rebuttal of the book Hit & Run."</u>
NZDF public statement	11/04/2018	<u>"NZDF Stands by Accounts of Operation Burnham."</u>
Ministerial public statement	20/04/2011	<u>"SAS' deadly Afghan counter attack revealed."</u>
Ministerial public statement	20/04/2011	<u>"Deadly retaliation by Kiwi SAS troops revealed."</u>
Ministerial public statement	21/04/2011	<u>"SAS attack not 'revenge killing' - Mapp."</u>
Ministerial public statement	24/04/2011	<u>"Q+A's Guyon Espiner interviews Dr Wayne Mapp."</u>
Ministerial public statement	1/07/2014	Prime Minister John Key interview.
Ministerial public statement	1/07/2014	<u>"Key denies SAS involvement in civilian deaths in Afghanistan."</u>
Ministerial public statement	1/07/2014	<u>"Categorical: 'NZ troops did not kill civilians'."</u>
Ministerial public statement	1/07/2014	<u>"Coleman 'can't rule out' civilian deaths."</u>
Ministerial public statement	22/03/2017	<u>"Former Defence Minister concedes civilian casualty in 2010 SAS raid in Afghanistan."</u>
Ministerial public statement	22/03/2017	<u>"Wayne Mapp does not deny 'Hit and Run' Afghan raid claims."</u>
Ministerial public statement	22/03/2017	<u>"Defence Force—Afghan Civilian Deaths Allegations in Hit & Run."</u>
Ministerial public statement	23/03/2017	<u>"Former Defence Minister Wayne Mapp's SAS comments informed by TV, Bill English says."</u>
Ministerial public statement	23/03/2017	<u>"Doubt grows over denials of civilian deaths in SAS raid in Afghanistan."</u>
Ministerial public statement	23/03/2017	<u>"Prime Minister Bill English admits 'uncertainty' over SAS' civilian casualties."</u>
Ministerial public statement	3/04/2017	<u>Post-Cabinet Press Conference: Monday 3 April 2017.</u>
Ministerial public statement	4/04/2017	<u>"Defence Force—Afghan Civilian Deaths Allegations."</u>

Schedule B

Relates to	Date	Title of document
Briefing to Minister	25/08/2010	<u>Operation Wātea: HQ ISAF Civilian Casualty Investigation into Operation Burnham 22 August 2010 (Operation Burnham Advice to Government (second information pack) at p. 4).</u>
Briefing to Minister	10/12/2010	<u>NZSAS Operations in Baghlan Province August and October 2010 (Operation Burnham Advice to Government (second information pack) at p. 7)</u>
Briefing to Minister	13/12/2010	<u>CRU and NZSAS Operations in Baghlan Province August and October 2010 (Operation Burnham Advice to Government (second information pack) at p. 11).</u>
Briefing to Minister	23/03/2017	<u>Dot Point Brief for Chief of Defence Force (Operation Burnham Advice to Government (second information pack) at p. 1).</u>
Briefing to Minister	29/03/2017	<u>Legal Threshold for Defence Force Inquiry into Operation Burnham (Operation Burnham Advice to Government (second information pack) at p. 29).</u>
Briefing to Minister	30/03/2017	<u>Defence Force Inquiries into the Allegations of Offending (March-April 2017 OIA responses at p. 5).</u>
Briefing to Minister	23/02/2018	<u>Operation Burnham – Talking Points for Prime Minister and Minister of Defence on Release of Further Official Information Act Material (March 2018 OIA responses at p. 17).</u>
Briefing to Minister	04/04/2018	<u>Operation Burnham – Update on a number of issues including further analysis of the book <i>Hit and Run</i> (October 2018 OIA responses at p. 6).</u>
Briefing to Minister	Unknown	<u>Operation Burnham Information Pack.</u>